In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1208

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a surety, was called upon under its Miller Act bond to pay approximately $84,000 to certain laborers and materialmen of a defaulting government contractor. The United States, pursuant to the terms of the contract, had retained a percentage of the contract price due the contractor. The surety filed suit in the Court of Claims against the United States to recover the retained amount, whereupon the United States claimed a setoff for unpaid federal taxes due from the contractor. Relying upon *United States* v. *Munsey Trust Co.*, 332 U.S. 234, the court denied the surety's motion to dismiss the setoff claim and awarded the surety only the balance of the amount

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retained by the government after deducting the amount of the setoff (Pet. 5–6).

The decision of the Court of Claims is correct. As petitioner recognizes (Pet. 3), it flows directly from *United States* v. *Munsey Trust Co.*, *supra*, where this Court held that the United States was entitled to set off against the surety (who had paid laborers and materialmen) a debt owed to the government by the contractor, although that debt arose from a wholly separate and independent transaction.

Petitioner, however, contends that the *Munsey* case was overruled by *Pearlman* v. *Reliance Ins. Co.*, 371 U.S. 132. In *Pearlman*, the government, having no further claim against the contractor, paid the retained amount over to the contractor's bankruptcy trustee. Thus the case did not involve the government's right of setoff, but only the competing rights of the surety and the contractor's general creditors once the government had released the retained fund. The Court expressly recognized that *Munsey* involved the separate issue of the government's right to set off its claims against the fund and that, in *Munsey*, "[w]e held that the Government could exercise the well-established common-law right of debtors to offset claims of their own against their creditors" (371 U.S. at 140). The Court in *Pearlman* did not purport to disturb this rule.[1] Changes in the *Munsey* result

[1] See also *United Pacific Insurance Co.* v. *United States*, 319 F. 2d 893, 894–895 (Ct. Cl.), where the parties conceded, and the Court of Claims agreed, that, upon the authority of *Munsey*, the United States was entitled to a set off against the retained fund for the contractor's unpaid federal tax liabilities, and that only the balance of the fund in excess of the government's claims was subject to the claims of the surety or trustee under *Pearlman*.

have been made by Congress only in a limited situation not applicable here. Cf. *Central Bank* v. *United States*, 345 U.S. 639, 642–643.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1966.

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